September 30, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338; 96-98; 98-147

Dear Ms. Dortch:

This letter is written for the purpose of addressing recent incumbent LEC requests to alter the substantive conclusions reached in the Triennial Review Order. These requests raise important procedural and substantive issues.

As an initial matter, the Commission must ensure that all substantive conversations regarding requested changes to the Triennial Review Order be fully documented in *ex parte* filings and placed on the record in the above-referenced dockets as is required by the Commission's rules. ALTS is concerned that private parties may have suggested changes to the staff or Commissioners that have not been documented in *ex parte* filings. ALTS is aware that certain officials representing certain Bell Operating Companies have made public statements to the press indicating their desire for additional changes to the Triennial Review, but, with one exception, the nature of these requested changes have not been identified in *ex parte* filings to the Commission. In the absence of adequate disclosure, parties to the proceeding are denied their right under the Administrative Procedure Act to participate fully in the proceeding, the Commission is denied the benefit of a balanced record containing arguments and data from opposing sides, and the Commission is unable to meet the requirement that it base future decisions on evidence in the record (thus virtually ensuring reversal on appeal). Moreover, a party's request for a change or clarification to a final agency order that is subject to appeal raises additional issues, most importantly the general prohibition against simultaneously seeking

reconsideration/clarification and appeal. For all of these reasons, the Commission must ensure that the record fully reflects communications with parties to the proceeding.[1]

Several different proposals to change the Triennial Review Order may well have already been presented to the FCC, but only BellSouth's request to alter the fiber-to-the-home ("FTTH") rules has actually been documented in *ex parte* filings in this proceeding.[2] ALTS is therefore only able to address that request in any detail. BellSouth has asked the FCC to extend the unbundling exemption currently applicable only to FTTH to hybrid fiber-copper arrangements in which the fiber extends somewhere "near" the end user. *See* BellSouth Sept. 16, 2003 *ex parte* letter. This proposal could be extremely harmful both to the CLEC industry and to the manufacturing industry. It cannot be adopted as part of an expedited reconsideration proceeding, and it should be rejected.[3]

First, the BellSouth proposal is squarely inconsistent with the Triennial Review Order and the recent *Errata*. In the recently-released *Errata* in this proceeding, the Commission clarified that the exemption from unbundling for FTTH loops applies only to loops that consist "entirely of fiber optic cable" and that the exemption from unbundling in FTTH greenfield situations applies only "when the incumbent LEC deploys such a loop to a [sic] end user's customer premises." *See* Sept. 17, 2003 *Errata* ¶¶ 37, 38. It would be utterly incoherent for the Commission to now turn around and reach the opposite conclusion, "clarifying" that what it really meant was that FTTH loops in fact include facilities containing fiber that only reaches a point "near" the end user's premises.

Second, even if the Commission were to reverse course in this manner, basic principles of administrative law require that it justify its change of course based on the evidence in the record. There is no basis in the BellSouth filings or anywhere in the Triennial Review Order for doing so. In all events, the task of assessing the evidence pertaining to fiber-to-the-curb and responding to

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1 In this regard, it is important to note that presentations made outside of the FCC building by parties to FCC officials, including presentations made on industry panels directed at FCC officials that are in attendance, should be filed as *ex parte* presentations in the record.

2 It should be noted that BellSouth did not describe the substance of its initial meetings with the FCC regarding FTTH. Its *ex parte* filings dated September 5, 2003 offer no indication of the specific arguments raised by BellSouth in those meetings. Its *ex parte* filings dated September 11, 2003, is simply a vague statement that it discussed "the Commission's recently adopted rules concerning Fiber-to-the-Home deployment" with a few unannotated attachments. It was only on September 17th that BellSouth actually provided any description of issues considered.

3 ALTS's understanding is that BellSouth's proposal only applies to greenfield situations (though this is not made explicit in its *ex parte* filings) and assumes for purposes of this letter that this is the case. In any event, no plausible case could be made for applying the BellSouth proposal to overbuilds/brownfields. The Commission justified its adoption of the current FTTH overbuild/brownfield rule based on its conclusion that competitors and incumbents "largely face the same obstacles" when overbuilding loops consisting entirely of fiber. *See* Triennial Review Order ¶ 276. Even if the Commission is correct with regard to fiber loops (which ALTS disputes), the same could never be said of loops that retain the last several hundred feet of legacy copper that the incumbents built and paid for while legally protected monopolists.

Bellsouth's specific proposal implicates many complex issues that could not (contrary to some proposals) be adequately addressed in an expedited reconsideration pleading cycle.

In the Triennial Review Order, the FCC exempted incumbent LECs from their unbundling obligations for FTTH based on what it described as a careful "balancing" of factors, including the level of impairment experienced by CLECs, the promotion of the policy goals of Section 706 and the presence of intermodal competition. *See* Triennial Review Order ¶ 234. In applying these factors to FTTH, the FCC only assessed the implications for fiber facilities that extend all the way to the end user's premises. Thus, the evidence upon which the Commission relied concerned the merits of eliminating unbundling for "loops consisting entirely of fiber optic cable between the main distribution frame (or its equivalent) and the demarcation point at the customer's premises." *See id*. n. 811.

For example, in assessing impairment, the FCC found that (1) the entry barriers associated with deploying FTTH are "largely the same" for incumbents and competitors; indeed it even gave credence to the possibility that competitors may have lower costs (*see id.* ¶ 275, n. 808); (2) CLECs have deployed more FTTH loops than ILECs, thus purportedly confirming the lack of impairment (*See id.* ¶¶ 275, 278, 279); (3) the potential financial "rewards" for deploying FTTH loops are "significant" and "far greater than for services provided over copper loops," purportedly allowing competitors to overcome entry barriers (*see id*. ¶¶ 274, 276); and (4) the application of unbundling obligations to incumbent LEC FTTH substantially diminished deployment (*see id*. ¶ 278). In support of these conclusions, the Commission relied primarily on the Corning Comments and several Corning *ex parte* letters. The information supplied by Corning in those documents applied only to loops consisting of fiber that extends all the way to the premises. In its Comments, Corning stated that all references to "fiber-to-the-home" "mean an entirely fiber optic cable transmission facility, between a distribution frame (or its equivalent) in an incumbent local exchange carrier central office and the loop demarcation point at an end-user customer premise." *See* Corning Comments at n. 2. Those comments and the *ex parte* letters relied heavily on a study prepared for Corning by Cambridge Strategic Management Group ("CSMG Study") that was filed as an attachment to Corning's comments. That study again provided information only as to FTTH loops as defined by Corning in its comments and later by the Commission in the Triennial Review Order. *See* CSMG Study at 7.

To justify adoption of the rule proposed by BellSouth, the FCC would need to conduct a careful "balancing" of all four of the factors assessed in the Triennial Review Order in light of the available data regarding fiber-to-the-curb. For instance, with regard to entry barriers, the Commission and interested parties would need to reexamine Corning's assertion that incumbents and competitors face equivalent equipment costs when deploying new loops. *See* Corning Comments at 25. That assertion was based on the assumption that the "equipment being purchased is unique to fiber-to-the-home, and thus any discounts based on scale are dependent on the size of the build out, rather than the size of the carrier's pre-existing network." *Id.* It is not at all clear that this holds true for BellSouth's proposed architecture in which significant amounts of copper and associated equipment (for which it enjoys substantial discounts as a result of the size of its "pre-existing network") would be used. With regard to CLEC deployment, the Commission would need to gather evidence concerning the amount of existing fiber to the curb installations and the proportion of ILEC versus CLEC deployment. With regard to financial "rewards," the Commission and interested parties would also need to consider the

revenue opportunities, since, again, the detailed information on these issues set forth in the CSMG Study and relied upon by the Commission concerned only situations where the fiber extends all the way to the customer premises. The same is true of assessments regarding the purported effect of unbundling exemptions on the incentives of incumbent LECs to deploy fiber-to-the-curb.[4] It is simply not possible for parties to address these four issues adequately as part of an expedited reconsideration pleading cycle.

Even without the benefit of a full examination of the data needed to perform a cost-benefit analysis, however, it is clear that the BellSouth proposal suffers from several fundamental and unfixable flaws. BellSouth has proposed that the FCC extend the FTTH unbundling exemption to any loop

> with capacity to deliver voice, video, and data services that consists of a fiber optic cable connection or transmission path, whether lit or dark, between a distribution frame (or its equivalent) in the central office and the loop demarcation point or serving terminal at or near the premises.

BellSouth Sept. 17, 2003 *ex parte* letter at 11. This proposal is extremely vague. Most obviously, BellSouth fails to adequately define such important concepts as the provision of "video" or "data" service or what it means to be "near" the premises. As competitors have learned through bitter experience, vague rules offer incumbent LECs opportunities to engage in self-help to deny inputs their competitors need.

Moreover, it is not clear how these rules could be clarified in a sensible way. If the Commission were to establish specific service criteria that a facility would need to meet to qualify for the unbundling exemption, those criteria would likely quickly become obsolete, forcing the Commission to update them again and again. The Commission could also try to establish a precise measure of what it means of to be "close" to the end user customer, but there is every reason to think that this too would soon be overtaken by technological innovation (*e.g.*, by technology that requires a shorter non-fiber connection to the end user) forcing the Commission again to reassess its rules. In addition, disputes would inevitably arise as to whether a particular facility in a particular location meets the relevant service and distance criteria. ILECs would also likely seek waivers in order to gain relief in particular areas where geography or some other factor prevents them from meeting the requirements (for example, what would the Commission do if an ILEC missed the proximity criterion by 20 feet? 40 feet? 100 feet?). The FCC would be forced to adjudicate these disputes (or leave it to the states to do so) and to fashion appropriate remedies.[5] In other words, defining "near to the premises" will require regulators to engage in line-drawing that will be inherently arbitrary and difficult to justify, and which will consume

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[4] For instance, the Triennial Review Order also recommended that states consider adjusting the cost of capital upward for fiber deployment. The Commission ought to await making further changes to the unbundling rules for fiber until it has a chance to assess the impact of this pricing change on the incumbent LECs' fiber deployment.

[5] Of course, one should not lose sight of the fact that the courts may not recognize the Commission's jurisdiction to make these decisions if the Commission reclassifies the inputs used by incumbent LECs to provide broadband Internet access as unregulated Title I services.

substantial regulatory resources. The "bright line" provided by the fiber to the home provision as set forth in the Triennial Review Order will provide much more certainty to the carriers and to the manufacturing industry.

The current unbundling exemption for FTTH is unnecessary and vague in important respects that exceed the scope of this letter, but there is at least no dispute that, to qualify under that rule, fiber must extend all the way to the end user premises. There is no need for service quality or fiber proximity criteria. This at least limits substantially the problems otherwise created by the BellSouth proposal. In light of this fact, and given that incumbent LECs other than BellSouth (*e.g.*, Verizon) are apparently planning to deploy fiber to the end user premises, there is simply no basis for pursuing the BellSouth proposal any further.

In accordance with the Commission's rules, a copy of this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

John Windhausen, Jr.

President, ALTS

cc: Christopher Libertelli
Matthew Brill
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